of profits of the income which, in law, is insufficient for the purpose of deduction under section 33(1) of the Income Tax Act 1967. It is interesting to note that the argument advanced on behalf of the taxpayer company as regards the purpose of the agreement as being necessary to keep the mining business efficient till its extinction, was similarly advanced in *Godden case* (*ante*) at pages 173 and 174. It was argued that the sum of £1,900 was in reality paid to keep the estate manager working hard in the interest of the company until cessation of business on March 31, 1958 when the new owners would take over. The Court of Appeal rejected this argument, as the intention of the parties was clear that the payment was made in lieu of notice. Similarly, in the present case, what the parties intended to do is clearly expressed in the first limb of clause 19(1)(d) and clause 3(iv) of the agreements, and the cessation of business is in fact the expected and immediate cause of the payment. Again, in *Commissioner of Inland Revenue* v. *The Anglo Brewing Co. Ltd.* (*ante*), Rowlatt J. held *ex gratia* payments to employees by a company ceasing operation were not made for the purpose of carrying on the company's trade and that they were not deductible. In my view, this is a clear case to illustrate that money paid because the company was not going to carry on the business anymore is not deductible even though the payment was intended to be *ex-gratia* and the company had made similar payments in the past when it was a going concern, to servants of long service who had left their employment.

From the authorities cited, in particular *Mayborough Newspaper Co. Ltd.* v. *The Federal Commissioner of Taxation* (*ante*) and *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (*ante*), I hold that, in the final analysis, the question whether money is "wholly and exclusively incurred in the production of gross income", within the meaning of section 33(1) of Income Tax Act 1967, is a question of fact to be decided on the circumstances of each case, and it is on the finding of these facts that a conclusion of law is arrived at. In this particular case, I am of the view that on the facts before the Special Commissioners, there was sufficient evidence to support their decision, and they are correct in law that the disputed sum is not deductible under section 33(1) of the Income Tax Act, 1967.

This appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

PUBLIC PROSECUTOR v. ALI BIN UMAR & ORS.

[A.C.J. (Yusoff Mohamed J.) November 17, 1981]
[Johore Bahru — Criminal Appeal No. 37 of 1981]

Criminal Law and Procedure — Charge of carrying tin ore on local craft without permission of Director-General of Customs — Defence of necessity — Mens Rea — Customs Act, 1967, s. 49(1).

Customs and Excise — Scope of s. 49(1) Customs Act, 1967 — Whether one of strict liability.

In this case the respondents had been charged under section 49(1) of the Customs Act, 1967, for carrying tin ore in a local craft without the permission of the Director-General of Customs. The defence of the respondents was that their boat had a broken rudder and it had drifted in distress into Malaysian waters. The defence raised was one of necessity. The learned Magistrate accepted the evidence of the respondents that the rudder of the boat was broken while the boat was in international waters and that the boat drifted into Malaysian waters but he held that in those circumstances the boat was in transit and therefore the offence under section 49(1) of the Customs Act was not committed. The Public Prosecutor appealed and it was submitted that the offence under section 49(1) of the Customs Act is one of strict liability and that no mental element or knowledge need be proved by the prosecution.

Held: (1) the respondents were justified out of necessity to enter Malaysian waters on specific reasons that the boat in which they were travelling was in distress due to the fact that the rudder of the boat was broken in international waters;

(2) it would appear that in strict liability cases it is still open to the accused to prove absence of knowledge and the application of the rule that *mens rea* is an essential ingredient of every offence has not been ousted depending on the subject-matter of the statute though the onus of proof required of the accused is on the balance of probabilities that he could not have reasonably known the existence of the law;

(3) even assuming a charge under section 49(1) of the Customs Act is one of strict liability, it may be construed that *mens rea* or guilty mind by the respondents was not present when the offence was alleged to have been committed.

Cases referred to:-

(1) *Lim Eng Soon* v. *Public Prosecutor* Johore Bahru Criminal Appeal No. 13 of 1953 *(unreported).*
(2) *Tumlong Kuandi* v. *Public Prosecutor* Johore Bahru Criminal Appeal No. 30 of 1980 *(unreported).*
(3) *Germaine Larsonneur* [1933] 24 C.A.R. 74.
(4) *Lim Chin Aik* v. *The Queen* [1963] M.L.J. 50.
(5) *Public Prosecutor* v. *Koo Cheh Yew & Anor.* [1980] 2 M.L.J. 235.
(6) *Mouse's Case* (1608) 12 Co. Rep. 63; 77 E.R. 1341.
(7) *William Gray* 29 Fed. Cas. 1300 No. 17, 694.

CRIMINAL APPEAL.

Abu Seman bin Haji Yusof (Deputy Public Prosecutor) for the appellant.

R.K. Menon for the respondent.

Yusoff Mohamed J.: This is an appeal by the Public Prosecutor against the acquittal of 13 respondents upon a charge under section 49(1) of the Customs Act, 1967.

The respondents were Indonesian seamen who were arrested by the Customs on February 1, 1978 within Malaysian Territorial Waters at ¾ mile, off the coast of Tanjung Ayam, Pengerang, Johore Bahru, on board a boat carrying 160 bags of tin ore. They were Indonesian citizens claiming that they came from Pulau Bangka, Indonesia and on their way to Singapore to sell the tin ore there. They had no documents pertaining to the boat as well as to the tin ore and they also did not have permission from the

Director-General of Customs, Malaysia to carry the said tin ore in their boat, contrary to section 49 of the Customs Act.

It was not disputed that the boat was a local craft within the meaning of section 49(1) of the Customs Act and it was not also disputed that the tin ore were dutiable goods on export but not on import, as declared in Customs Duties Order, 1978.

The defence advanced by the respondents was that their boat had a broken rudder and it drifted in distress into Malaysian waters. In support of this contention, there is the evidence of Mr. R.N. Frappell (DW13), a Marine Surveyor from Singapore who conducted a survey on the boat at the Customs Jetty, Johore Bahru on February 10, 1978, 9 days after the incident. He found that the rudder stalk of the boat made of stainless steel bar was fractured. He found part of the stalk and other mechanism of the rudder were left idle in the boat instead of being attached to the rudder stalk. The respondents also claimed that they had informed Superintendent of Customs, Mr. Kali Kavadan (PW10) immediately when he took over investigations of their case on February 1, 1978 of the fact that their boat had a broken rudder. This was confirmed by the Superintendent in his evidence at page 29 of the notes of evidence. The defence raised was one of necessity.

In his judgment, the learned Magistrate accepted the evidence of the respondents that the rudder of the boat was broken while the boat was in International waters and that the boat drifted into Malaysian waters, but he held that in those circumstances, the boat was in transit and therefore the offence under section 49(1) was not committed. There was no argument before him whether the boat was in fact on transit. The defence of necessity raised by the respondents was not considered though the Magistrate acquitted and discharged all the respondents in consequence.

On appeal, the learned Senior Federal Counsel submitted that the offence under section 49(1) of the Customs Act is one of strict liability and that no mental element or knowledge need be proved by the prosecutor. He referred to *Lim Eng Soon* v. *Public Prosecutor,*[1] where upon a charge under section 4(1) of Dangerous Drugs Ordinance 1952 which imposes prohibition on import of raw opium without authorization Storr J. held that the offence was one of absolute prohibition and therefore it was unnecessary for the prosecution to prove *mens rea* or knowledge. He also referred to *Tumlong Kuandi* v. *Public Prosecutor,*[2] where in a similar charge under section 49(1) of the Customs Act the appellant raised the defence that he did not know he was in Malaysian waters, the learned judge, Yusof Abdul Rashid J. held that the offence was one of strict liability which requires no guilty intention or knowledge on the part of the appellant.

These two cases are distinguishable in that the defences put forward were ignorance of the law which the learned judges in principle held was no defence at law.

Most interesting is the case of *Germaine Larsonneur,*[3] also raised by the learned Senior Federal Counsel in support of his contention that *mens rea* is not relevant in cases of strict liability. In that case the facts are:—

> "A French subject was permitted to land in the United Kingdom subject to certain conditions endorsed on her passport. These conditions were subsequently varied by a condition requiring her to depart from the United Kingdom not later than a certain date. On that date she went to the Irish Free State. An order for her deportation from the Irish Free State was made by the executive authorities of that country, and *she was subsequently brought back to Holyhead in the custody of the Irish Free State police, who there handed her over to the police of the United Kingdom,* by whom she was detained. She was convicted on a charge that she 'being an alien to whom leave to land in the United Kingdom has been refused was found in the United Kingdom', contrary to arts. 1(3)(g) and 18(1)(b) of the Aliens Order, 1920, as amended (a) ...." (my italics).

It was held there that the circumstances in which she (Larsonneur) returned to the United Kingdom being immaterial, although she had done no voluntary act but was brought into the United Kingdom in the custody of the police.

Larsonneur's case was decided on the peculiarity of the statute under which she was charged and some writers were confident that such an unjust result could hardly arise under any of other statutes — see *Smith & Hogan* on Criminal Law 2nd Edition at page 35.

On strict liability cases, the Privy Council had considered in *Lim Chin Aik* v. *The Queen,*[4] where it was held that the appellant, Lim Chin Aik, was not guilty of the charge of contravening the law on his entering and remaining in the State of Singapore imposed by the government because *he could not possibly have known* of the existence of the law. *Lim Chin Aik's* case was later considered by the Federal Court in *Public Prosecutor* v. *Koo Cheh Yew & Anor.*[5] a reference under section 66(1) Courts of Judicature Act 1964, in which one of the questions referred to was whether a denial by the accused of knowledge of prohibition order, on a charge under section 135(1) of the Customs Act 1967 would entitle the accused to an acquittal. In that reference, the Federal Court found at page 238 paragraph B right column that:—

> "the exception to the rule against ignorance of law as a defence should not be extended beyond the cases where the defendant could not possibly have known of the existence of the law he had offended against...."

and further on page 240, paragraph D left column, it was held that:—

> "Even if he (accused) proves to the satisfaction of the court that he in fact does not know the existence of the prohibition, he is still not entitled to be acquitted *unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition....*" (my italics).

It would appear that in crimes known as strict liability cases it is still open to the accused to prove absence of knowledge and the application of the rule that *mens rea* is an essential ingredient of every offence has not been ousted depending on the subject-matter of the statute though the onus of proof required of the accused is on the balance of probabilities that he could not have reasonably known the existence of the law.

The defence of necessity on the other hand, is very controversial in nature and there are conflicting views on its applicability. The decision in *Larson-*

neur's case is against the raising of necessity as a general defence. It was generally thought that the law ought not to afford a defence in such a case.

However, in certain circumstances, where a person is able to choose between two courses, one of which involves breaking the criminal law, and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law, the court would temper such situation with justice.

Instances of these are:

In a storm at sea, the cargo may be jettisoned for the safety of passengers. — See *Mouse's* case.[6] There is a right to land on the shore (even where it would otherwise be a trespass) in cases of peril or necessity. — See *Halsbury's* Laws of England, 3rd edition, xxxix 564. Specifically the defence of necessity can be recognized during emergency, so specific in character that the acceptance of the defence does not imperil the general rule. — See *Glanville Williams* on Criminal Law 1978, 557. In an American case, the master of a ship was held not guilty of violating an embargo act by illegal entry into a Port when, as the result of storms, this course was "necessary" for the preservation of the vessel and the cargo and lives of those on board. — See *William Gray.*[7]

In the present case, I am of the view that out of necessity it justified the respondents to enter the Malaysian waters on specific reasons that the boat in which they were travelling was in distress due to the fact that the rudder of the boat was broken in International waters. In those circumstances it would be necessary for the respondents to seek shelter for the safety of the boat and to preserve the lives of the crew during such distress. In that situation it would be far fetched to imagine that the respondents would have to obtain permission of the Director-General under section 49(1) and (2) of the Customs Act for carrying the tin-ores which were not destined nor intended for export from Malaysia. Even assuming that a charge under section 49(1) of the Customs Act, in the present case is one of strict liability, following *Public Prosecutor* v. *Koo Cheh Yew & Anor.*, it may be construed that *mens rea* or guilty mind of the respondents was not present when the offence was alleged to have been committed.

In this event, the appeal is dismissed and for different reasons, the Magistrate's order in respect of the boat and the goods is confirmed.

Appeal dismissed.

Solicitors: *R. K. Menon & Co.*

MOHAMMAD BIN BUYONG v. PEMUNGUT HASIL TANAH GOMBAK & ORS.

[A.C.J. (Hashim Yeop A. Sani J.) November 30, 1981]
[Kuala Lumpur — Originating Motion No. A 16 of 1980]

Land Law — Registration of instrument — What constitutes — Power of Collector to cancel or delete entry in register — Power of Collector to register instrument although prior instrument has been presented — National Land Code, 1965, ss. 217(2), 298, 300, 304, 340, 380 & 382.

In this case a transfer form 14A was submitted to the Land Office, Gombak by the appellant. The form was signed by one Misriah binte Amirin claiming to be the attorney of the second respondent. When Form 14A was presented it was accompanied by an office copy of a document purporting to be a power of attorney but not the original issue document of title. Despite the non-production of the original issue document of title the presentation was recorded in the presentation book of the land office. Subsequently the land office received a letter from the second respondent stating that she never at any time gave a power of attorney to Misriah binte Amirin. The Collector considered the matter and decided to reject the instrument in accordance with section 298 of the National Land Code. Subsequently an application for transfer of the shares of the second respondent to the second, third and fourth respondents was received and registered by the Collector. The appellant appealed against the decision of the Collector.

Held: (1) in this case although the instrument of transfer to the appellant had been presented and recorded in the Presentation Book, it had not been registered and therefore the appellant cannot claim indefeasibility under section 340 of the National Land Code since the facts revealed that there was no registration;

(2) although there is no power of the Collector to alter or cancel a memorial, the entry in this case never acquired the sanctity of a memorial which under section 304(4) of the National Land Code was conclusive evidence of registration. Therefore it could properly be deleted or cancelled;

(3) although technically the act of the Collector in registering the instrument of transfer to the 2nd, 3rd and 4th respondents would appear to be in breach of section 300 of the National Land Code, the words "shall not register" appearing in section 300(1)(a) of the Code are on the facts of this case merely directory and not mandatory and the apparent failure of the Collector to comply with the section did not invalidate the registration.

Case referred to:-

(1) *Island and Peninsular Development Bhd. & Anor.* v. *Legal Adviser, Kedah* [1973] 2 M.L.J. 71.

ORIGINATING MOTION.

A. Krishnan for the appellant.

Abdul Malik bin Mohamed Salleh (Legal Adviser, Selangor) for the 1st respondent.

Zainuddin bin Ismail for 2nd, 3rd & 4th respondents.

Hashim Yeop A. Sani J.: This is an appeal under section 418 of the National Land Code against the decision of the Collector of Land Revenue, Gombak. The decision involved two transactions over the undivided shares of the second respondent in land EMR. 4512 Lot No. 3516 in the Mukim of Setapak.

The facts leading up to the appeal may be briefly stated as follows. On August 14, 1979 a transfer Form 14A was submitted to the Land Office Gombak by the appellant. The form was signed by one Misriah binte Amirin claiming to be the attorney of the second respondent as transferor and the appellant as transferee of 12/19 shares in the said land for a consideration of $50,000. When Form 14A was pre-